Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-767

MAX L. GLASGOW AND STEPHANIE J. GLASGOW,
Petitioners,

v.

CHARLES J. BARTLESON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

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MAX L. GLASGOW AND STEPHANIE J. GLASGOW,
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v.

CHARLES J. BARTLESON,
Respondent.

PETITIONER FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

The petitioners, Max L. Glasgow and Stephanie J. Glasgow, pray that a writ of certiorari issue to review the judgment of the Washington State Supreme Court, rendering its decision June 5, 1976, rehearing denied and mandate handed down June 5, 1978.

OPINIONS BELOW

On August 24, 1978, Mr. Justice Rehnquist granted an extension for filing the petition to and including September 15, 1978.

State Supreme Court. The petition of the State Supreme Court of Washington State was filed February 20, 1978 and mandate handed down June 5, 1978. No opinions.

Washington State Court of Appeals Divison III. Filed June 14, 1976.

Decision rendered December 21, 1977.

Motion for reconsideration was filed January 9, 1978 and denied January 13, 1978.

Superior Court, Spokane County. Petition filed March 1, 1976. Judgment entered June 4, 1977. Judgment awarded to respondent.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3) 19.1 (a) to review the order of the State of Washington Supreme Court entered on June 5, 1978.

QUESTIONS PRESENTED

Whether or not the trial court was in error in denying a continuance to the plaintiffs, and whether this resulted in a denial of due process having been denied a fair and impartial trial. Does a person have the right to a trial by the Fifth and Fourteenth Amendments?

STATEMENT OF THE CASE

This involves a dispute over an oral contract and purchase agreement between Max L. Glasgow and Stephanie

J. Glasgow, plaintiffs and the respondent, C.J. Bartleston. A contract was entered into in 1960 which ran until 1963 with an option to purchase. Another lease was written up in 1963, was not signed but was understood by the two parties to be mutually agreeable at $150.00 per month. A down payment was to accrue to the amount of $4,000.00 with one-half of the rent to be applied toward it. This was still at the agreed $150.00 per month.

In 1964, Dr. Glasgow faced some extreme financial difficulty during which time Mr. Bartleson told Dr. Glasgow to "let the payments slide" until he got back on his feet, as Dr. Glasgow was contemplating leaving Spokane to join a friend in a veterinary practice in Canada. When attempting to catch up Dr. Glasgow doubled or more than doubled most payments, falling behind occasionally. At this point there was no stipulation by Mr Bartleson as to the amount over $150.00 to "catch up." Dr. Glasgow, himself, undertook the determination of paying $300.00 to $500.00 per month. It was at this time a loose agreement. These payments would have been current by 1975 or possibly before if there had not been severe setbacks in Dr. Glasgow's health with nine months of Salmonella followed by a near-fatal car accident. It took several months to recover from these.

There were receipts to illustrate the breakdown, i.e., exhibit of the court through 1973. At the time a $4,000.00 was accrued, the contract was to be changed to a purchase agreement at $193.00 per month at 6% interest.

It was stated in the courts that there was no oral contract because the purchase price had not been established (as per Dr. Glasgow's testimony). He did not state this although it was inferred. What he meant to say and was not given time to speak, was that the price would have been changed somewhat because it was agreed by the two parties that the price of the well, earlier installed, would be added on to make the price in the range of

$3,000.00 higher. Testified as follows:

> [By Mr. Dawson- Q. As I understand it, there was discussion about changing the terms of the purchase price, is that correct? A. Yes, it is. Q. Was there ever any agreement as to changing the purchase price? A. It would be approximately $3,000 more, but there was room for latitude on that. Q. In other words you discussed changing the terms. I'm asking you did you ever in fact change the purchase price from $30,000 to any other figure? A. No. When I pressed for that, he said it would be about $33,000. Q. No. Did you ever agree, you and John. I understand you discussed it, but was there any .. A. There wasn't any exact agreement, no.

That is still the same contract with a provision for the well.

In January, 1976, the Glasgows were notified that the place had been sold and were given thirty days notice to move. They were shocked as they had always had first option. They then learned that two real estate men, representing two different firms had been waiting in the background to acquire the property. Angered by what seemed a terrible injustice, the Glasgows instigated a suit against Mr. C. J. Bartleson and Skyline Realty. At this time, they acquired an attorney, Mr. Toby Gibson, whom they discharged two months later when they discovered he was telling lies to opposing counsel, i.e., that the Glasgows had agreed to vacate the premises by April 30, 1976 when they had never considered such an agreement as Dr. Glasgow was not easily willing to leave a practice of veterinary medicine he had built for 16 years. He had no place to go at this time because he had been divested of all

funds for legal fees to Mr. Gibson (approximately $3,000.00). There were many other factors such as confiscating funds put into his trust. Mr. Gibson was later discredited through disbarment.

New Counsel was then retained who did not have time to prepare for trial. His layout of time was as follows: Thursday evening (5:00) he was retained, Friday (all day in court) Saturday and Sunday prepared for trial Monday, Monday was in court with trial, Tuesday morning and Wednesday morning were the only real preparation time. (See Mr. Dawson's affidavit). Since it was impossible to prepare in this short time, part of the suit had to be dropped which involved harassment from the two realtors. Witnesses and evidence did not get examined.

ARGUMENT OF COUNSEL

1. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE MOTION FOR CONTINUANCE?

We feel that the trial court erred in failing to grant appellants' motion for continuance. Appellants discharged their original attorney, Tolmon (Toby) Gibson, May 19, 1976, one week before the May 26 trial date. On May 20th, they retained the services of another attorney, Edward Dawson, who, on May 21st, moved for the continuance in question. The continuance was denied May 24th, leaving Mr. Dawson with only two days to prepare for trial. The case involved a complicated factual background with several different theories of law upon which to proceed. There were questions as to the interpretation of a number of documents and there was need for an accounting and evaluation of property,

including land appraisals. Even at first blush it was evident that it would be totally impossible for Mr. Dawson, or any other attorney, to prepare for trial on such short notice. At trial, summary judgment was entered for appellee.

In Washington, a continuance because of the withdrawal or discharge of a party's attorney in a civil case is a matter within the discretion of the trial court, not a matter of right, and the court's ruling in exercise of that discretion will not be disturbed except for *manifest abuse* of *discretion.Jankelson v. Cisel,* 3 Wn. App. 139, 473 P.2d 202 (1970). The point is well settled that the discharge of an attorney in a civil case does not give the party an absolute right of continuance. The rationale for this rule is that if the contrary were true, all a party desiring a continuance would have to do would be to discharge his counsel. *Peterson v. Crockett,* 158 Wash. 631, 291 Pac. 791 (1930). But in considering the motives and propriety of a party who discharges his attorney right before trial, one must look to the circumstances of the particular case.

In the case at bar, the appellants' first attorney, Mr. Gibson, was so inadequate that they were left with no other alternative than to discharge him. A few of his inadequacies were:

1. He did not talk to, inquire of, or request to meet a single witness.
2. Money submitted to him by appellant to be put into the trust of the court to stay a writ of restitution, was two weeks late and $350 short. Because of this fact the date of the trial was moved up from June 26, 1976.
3. After being on the case for three months, Mr. Gibson told the appellants, one day before an earlier trial date, that due to the fact that the appellee had been paying the property taxes on the

land in question, there was no reason to go to trial since they would probably lose anyway. This fact about the property taxes was something Gibson must have known well before that time, since it was mentioned in the deposition of the appellant. But Mr. Gibson had repeatedly assured the appellants that they would get a decision in their favor.

4. He told appellee's attorney that the Glasgows were moving off the premises and that it was just a matter of time until they did so. The Glasgows never had any intention of moving.
5. He never returned phone calls to the Glasgows and only begrudgingly set up meetings with them.

In short, due to neglect, inaction, indifference, misrepresentations and ill-preparation, the appellants discharged Mr. Gibson a week before the trial. Since that time Mr. Gibson has been suspended from the practice of law in Washington.

Despite the general rule which imputes the attorney's neglect to the client, there are exceptional cases in which the client, relatively free from personal neglect, should be relieved from the legal injury attributable to the inaction or procrastination of his counsel. It has been held that under circumstances, such as in the instant case, where the client was unknowingly deprived of effective representation, he will not be charged with responsibility for the misconduct of the counsel of record. *Daley v. County of Butte,* 38 Cal.Rptr. 693 (1964).

In the *Daley* case, the attorney had failed to serve process, failed to appear at successive pretrial conferences, failed to communicate with court, client and other counsel and refused to get on with the lawsuit. The case was dismissed for lack of prosecution. The District Court of

Appeals overturned this decision and stated at 700:

> "Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel."

The appellants did "sit back in peace and confidence" while Mr. Gibson made assurances to them that he was doing everying possible and that they were all but assured a decision in their favor. The appellants had added reason to rely on Mr. Gibson in view of the fact that he was well known in the community and had run for a seat on the Superior Court bench in Spokane. But when it became evident to the appellants that Mr. Gibson had misled them in numerous instances and when right before the trial he told them that they should not go to trial, the appellants discharged him and diligently sought another attorney. Mr. Dawson was hired and moved for the continuance. Here, since the continuance was denied, the appellants were, in

essence, imputed with their attorney's neglect and suffered legal injury because of it. We feel that the appellants should not be charged with responsibility for the misconduct of Mr. Gibson and therefore should not have been forced to proceed to trial without the continuance.

In exercising its discretion concerning a continuance, the court may make some specific *considerations.* It may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; and any other matters that have a natural bearing upon the exercise of the discretion vested in the court. *Balandzich v. Demeroto,* 10 Wn.App. 718, P.2d 994 (1974).

In the instant case, the needs of the moving party are evidenced by considering the complexity of the case, the misconduct of their previous attorney and the fact that their new attorney would have only two days to prepare for trial if the continuance was denied. According to the court file the appellants had had no previous continuances, so the appelle's argument that the motion for continuance was a delay tactic is not well-founded. In *Reecy v. Reecy,* 271 N.E.2d 91 (1971), the Court stated that the fact that there has been one previous continuance does not indicate that the intention of a party seeking a second continuance is to delay the administration of justice. So where, as here, one has had no previous continuances, the argument of the continuance being a delay tactic is untenable.

Concerning the necessity of reasonably prompt disposition of the litigation, the appellee contended in his motion to dismiss the motion for continuance that any delay would cause them great harm due to a sale of the property and a promise of delivery. But in view of the fact

of appellants' right under Rule 8.1(b) of the Rules of Appellate Procedure, to supersede the enforcement of a decision affecting property by filing a supersedeas bond, the appellee would not be guaranteed a delivery of property until after an appeal, if the Glasgows were to lose at the trial level. With this in mind, the continuance of the trial would not have produced any more damage to the appellee.

It seems that if the court had made the above considerations, no result other than the granting of the continuance could have been reached. In *State v. Potts,* 1 Wn.App. 614, 464 P.2d 742 (1970), the limits within which the personal judgment of the court must be exercised were described where the court stated at 620:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains. [Footnote omitted- Cardozo, *The Nature of the Judicial Process,* Yale University Press 141 (1921).

As previously stated, a continuance is a matter within the discretion of the trial court and the court's ruling in exercise of that discretion will not be disturbed except for *manifest abuse of discretion. Jankelson v. Cisel,* supra. In *Rehak v. Rehak,* 1

Wn.App. 963, 465 P.2d 687 (1970), the court cited with approval *Delno v. Market St. Ry.,* 124 F.2d 965, 967 (9th Cir. 1942), that discretion is said to be abused:

> when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no *reasonable man* would take the view adopted by the trial court.

We feel that if one makes the relevant considerations, as stated above, then no *reasonable man* would take the view adopted by the trial court and therefore the denial of the continuance was a *manifest abuse* of *discretion.*

Though the courts are hesitant to declare manifest abuse of a trial court's discretion in denying a continuance, cases in other jurisdictions with circumstances similar to the case at bar have been reversed for such abuse of discretion. In *Finch v. Wallberg Dredging Co.,* 76 Idaho 246, 281 P.2d 136 (1955), the denial of a continuance was an abuse of discretion where attorneys who had represented the plaintiffs withdrew three days before the trial date and plaintiffs were diligent in engaging a new attorney who, because of other urgent matters, as well as the complexity of the case, could not prepare in time for the trial. Another court has said that in the absence of a showing that the withdrawal of counsel was either unjustified or merely collusive for the purpose of delay, denial of continuance was an abuse of discretion, where new counsel, employed without delay, had only one full working day in which to prepare for trial. *Illinois Banker Life Association v. Theodore,* 47 Ariz. 314, 55 P.2d 806 (1936).

In another case the defendant was held to have been prejudiced being forced to trial within two days, when his

substitute counsel was not given sufficient time to familiarize himself fully with the law and the facts of the case. *Hudgins v. Hall,* 183 Va. 577, 32 S.E.2d 715 (1945). In yet another case, where wife's motion for continuance of hearing on motion to modify custody provisions of a divorce decree was verified by her counsel and alleged that counsel had an extremely heavy court schedule and had been absent from state for seven days, that her previous counsel had been granted leave to withdraw just sixteen days prior to scheduled hearing, that counsel wished to avail himself of discovery procedures and that in time allotted he could not adequately prepare for trial, and such verified motion was supported by affidavit from counsel's physician that counsel was ill with influenza and should be confined to bed, denial of motion for continuance was abuse of discretion. *Reecy v. Reecy,* supra.

In determining whether there has been an abuse of discretion in the granting or denying of a continuance, the Supreme Court of Washington has indicated that it will view the facts and circumstances of the particular case. *Peterson v. David,* 69 Wn.1d 566, 419 P.2d 138 (1966). In the case at bar, the facts and circumstances indicate that the appellants acted in good faith and with due diligence in regard to the events leading up to the motion for continuance. Being left with no other choice, they discharged their attorney and immediately retained another. They properly filed affidavits and the motion for continuance. Upon denial of the continuance, their case was *prejudiced* by the fact that they new attorney only had two days to prepare for trial. The basis of a continuance in a civil case should rest upon the right of a party to try the cause upon its merits, and relief, where timely and appropriately sought in the form of a continuance, should be granted where the applicant acts in good faith and with

due diligence, and where it clearly appears that he is deprived of his right to a fair trial if forced to proceed at the appointed time. The denial of the continuance here worked palpable injustice.

For the foregoing reasons, we respectively submit that the trial court erred in denying the motion for continuance and the trial decision should be reversed and the appellant be awarded a new trial.

REASONS FOR GRANTING THE WRIT

Everyone, under the Constitution of the United States, has the right to a trial by law and by the principle of fairness and equity. This was denied.

"The due process of law" provision of the Fourteenth Amendment and the Fifth Amendment guarantees to every person his day in court and reasonable evidence to be *heard* or defended and it requires orderly proceedings in competent tribunal in accordance with generally established rules not violative of fundamental rights. *Rosenblum v. Rosenblum*, 1943, 42 N.Y.S. 2d 626, 181 Misc. 78.

There is also a terrible inconsistency here from the trial court. If the court deemed a month-to-month tenancy to prevail, then there should be returned to the appellants their $4,000.00 downpayment on the property and the capital improvements as well. It appears that legal maneuvers have been exploited to rob them not only of their rights but of their property as well. And this property is all Dr. Glasgow had to show for seventeen years of hard work.

Therefore, because of the gross inequity and injustice that has been done to the appellants, we feel the decision should be reversed and the writ of certiorari should be granted.

CONCLUSION

The trial court's insensitivity to need for protecting plaintiffs from a hasty trial is a serious abuse of discretion. Changing from incompetent counsel is an individual right that has merit and should be supported and preserved by the lower courts. Laymen have the astute need to be protected by competent professionals rather than "led to the slaughter" so to speak. To be denied a continuance in this case is a manifest error, which should not be allowed to persist in the lower courts.

This petition, therefore, should be granted.

Respectfully submitted,

Stephanie J. Glasgow
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Spokane, Washington 99204
Counsel for Petitioner

September 13, 1978

APPENDIX A

MAX L. GLASGOW, JR. and
STEPHANIE J. GLASGOW, a
marital community,

Appellants,

v.

CHARLES L. BARTLESON,
dealing in his separate
property, and JAMES HORD,
d/b/a SKYLINE REALTY,

Respondents.

AFFIDAVIT OF
EDWARD A. DAWSON

EDWARD A. DAWSON, being first duly sworn on oath deposes and says:

1. I am the attorney who represented MAX L. GLASGOW and STEPHANIE J. GLASGOW at trial in regard to the lease hold and purchase rights on certain real property in Spokane, Washington.

2. That litigation was under cause number 229986 in Spokane County, Washington.

3. MR. and MRS. GLASGOW came to me after their attorney of record, MR. TOBY GIBSON, had functionally abandoned them a short time prior to the scheduled trial date.

4. At the time MR. and MRS. GLASGOW came to me, another lawyer, RAYMOND EBERLE, had looked at the file of the GLASGOW'S and determined that he would not have time to prepare the case in light of the condition of the trial and his schedule.

I agreed to represent the GLASGOWS because they seemed to have been abandoned in a position where they

would not have any representation at all. MR. TOBY GIBSON had apparently taken the GLASGOW money as a retainer and then did nothing else.

5. Immediately upon agreeing to help the GLASGOWS, I made arrangements to seek a continuance from the presiding court, Judge George Shields, on the basis of lack of time for preparation and the abandonment of the GLASGOWS by their attorney.

6. I was surprised at the fact that Judge Shields, in spite of the knowledge in the legal community of incompetence and inattention of MR. GIBSON to client's matters, denied the request for continuance.

It might be noted at this time that MR. TOBY GIBSON has since been disbarred. MR. GIBSON was found to be completely unresponsive to client's needs and also was found to have appropriated client's funds.

7. While I expended as much time as I could in light of my schedule and the very short time prior to the trial, I certainly did not have the opportunity to fully investigate and put together the factual basis that I would have desired to represent the GLASGOWS.

DATED this 13th day of September, 1978.

/s/ Edward A. Dawson
EDWARD A. DAWSON

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

MAX L. GLASGOW, JR., and STEPHANIE J. GLASGOW, a marital community,

Plaintiffs)

v.

CHARLES J. BARTLESON, dealing in his separate property, and JAMES HORD d/b/a SKYLINE REALTY,

Defendants.

No. 229986

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled and numbered cause came on for trial on the 26th day of May, 1976 and was tried to the Court with Edward Dawson appearing as attorney for Plaintiffs, and William D. Roberts appearing as attorney for Defendants. After hearing the allegations and proofs of the Plaintiffs, and the arguments of both counsel and upon entertaining a Motion for Summary Judgment at the conclusion of Plaintiffs' case in chief, and the Court being fully advised herein, the Court now finds generally in favor of the Defendants and against the Plaintiffs and hereby makes the following Findings of Fact and Conclusions of Law, which constitute the decision of the Court herein.

FINDINGS OF FACT

1. That with regard to that portion of the suit directed towards Defendant JAMES HORD, there was no evidence presented upon trial that touched upon the factual allegations contained in Plaintiffs' Complaint.

2. That with regard to that portion of the suit directed towards Defendant CHARLES J. BARTLESON the Court makes the following Findings of Fact:

a) That the proposed 1963 Lease Agreement was never executed by the parties because Plaintiffs felt they would not be able to abide by its terms.

b) That no oral agreement was ever reached between the parties with respect to a lease or option to purchase because essential terms, including the sales price and interest rate, had not been mutually agreed upon by the parties.

c) That plaintiffs had been in default in rental payments at all times, since 1960.

d) That Plaintiffs are required to pay the sum of $250.00 per month as rental for the property.

e) That plaintiffs are presently in default in the rental payments in the sum of Three Thousand Nine Hundred Seventy ($3,970.00) Dollars.

f) That Defendant CHARLES J. BARTLESON sold the subject property to third persons prior to the institution of this law suit.

g) That defendant CHARLES J. BARTLESON loaned Plaintiffs Two Thousand ($2,000.00) on a Promissory Note in 1961.

h) That the Promissory Note referred to in Finding of Fact 2.g) has a balance due of One Thousand Seven Hundred Thirty-two and 26/100 ($1,732.26) Dollars which sum includes interest computed at 8% per annum through May 26, 1975.

i) That said Promissory Note has a provision for the payment of attorney fees in the event that the retention of an attorney is necessary to collect the same.

CONCLUSIONS OF LAW

1. With respect to that part of the suit directed towards JAMES HORD, the Court makes the following Conclusions of Law:

a) That Defendant JAMES HORD is entitled to judgment herein, directing that Plaintiffs take nothing by

their action against him and dismissing said action with prejudice.

b) That Defendant JAMES HORD be entitled to Fifteen ($15.00) Dollars costs and Ten ($10.00) Dollars statutory attorney fees herein.

2. With respect to that part of the suit directed towards JAMES BARTLESON and his Cross Complaint against Plaintiffs, the Court makes the following Conclusions of Law:

a) That the proposed 1963 Lease has never had any legal effect and does not constitute a written lease.

b) That there has never been an oral agreement between the parties that could be raised to the status of a lease, or an oral agreement that could give Plaintiffs the option to purchase the property.

c) That at all times since November of 1963, tenancy of the Plaintiffs have been one from month to month and nothing more.

d) That Defendant, CHARLES J. BARTLESON is generally entitled to judgment herein, directing that Plaintiffs take nothing by their action and dismissing their action against him with prejudice.

e) That Defendant CHARLES J. BARTLESON is entitled to possession of the subject property as against the Plaintiffs herein.

f) That possession may be effectuated by serving on the Sheriff of Spokane County the existing Writ of Restitution.

g) That Defendant CHARLES J. BARTLESON is entitled to judgment against the Plaintiffs for the amount of rent due and owing in the sum of Three Thousand Nine Hundred Seventy ($3,970.00) Dollars, which amount is computed to May 28, 1976 and Five ($5.00) Dollars per day thereafter until Plaintiffs give up possession of the subject property.

h) That Defendant CHARLES J. BARTLESON is entitled to statutory attorney fees in the amount of Ten ($10.00) for defending this suit plus costs in the amount of Fifteen ($15.00) Dollars.

i) That the portion of the Unlawful Detainer statute, R.C.W. 59.12.170 which allows double damages is inapplicable to this case.

j) That Defendant CHARLES J. BARTLESON is entitled to judgment against the Plaintiffs in the amount of One Thousand Seven Hundred Thirty-two and 26/100 $1,732.26) Dollars, which sum includes interest to May 26, 1976 on the Promissory note executed by the Plaintiffs in 1961.

k) That Defendant CHARLES J. BARTLESON is entitled to Three Hundred Fifty ($350.00) attorney fees for the collection of said note.

Dated this 28th day of May, 1976.

/s/Patrick McCabe
Judge

Presented by:

COOPER & ROBERTS

By:

/s/ WILLIAM D. ROBERTS
Attorney for Defendants

/s/ EDWARD DAWSON
Attorney for Plaintiffs

APPENDIX C

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

MAX L. GLASGOW, JR., and STEPHANIE J. GLASGOW, a marital community,

Appellants,

v.

CHARLES J. BARTLESON, dealing in his separate property,

Respondent.

No. 2007–III

Division Three

Filed December 21, 1977

MUNSON, C.J.—The plaintiffs appeal the judgment holding there existed no oral contract with an option to purchase between the parties and that plaintiffs were not entitled to possession of the property.

In 1960 the parties entered into a 3-year lease whereby the plaintiffs leased the property at North 14322 Market Street from the defendant.[1] In 1963 a lease with option to purchase was drawn, but neither party signed it because plaintiffs were apprehensive about their ability to meet its terms.

That lease was to run through 1968 and the option purchase price was set at $30,000, with $4,000 as the down payment,[2] monthly payments of $150 and 6 percent

[1] Dr. Glasgow executed an earnest money agreement on March 19, 1961, to purchase the property, designating the agreement "an option lease." This document (exhibit No. 2) was never signed by Mr. Bartleson.

[2] $1,000 payable with exercise of option and $3,000 at closing.

interest on the purchase price. Even though the parties did not execute this lease, plaintiffs continued in possession of the property and made monthly payments. Because plaintiffs were encountering financial difficulties, they were not current with their monthly payments until the first part of 1976. Until 1970, defendant credited one-half of each payment made by plaintiffs to the down payment of $4,000. During this time plaintiffs offered defendant another piece of property as the down payment, and later when that property was sold on contract, offered defendant the contract as the down payment. The defendant consistently refused these offers, stating that he wanted cash. During plaintiffs' occupany, they improved the property, although the value of those improvements is in dispute. There was testimony, however, that the rent was not raised because plaintiffs were required to make their own improvements; defendant testified the improvements made by plaintiffs did not increase the value of the property.

On December 26, 1975, defendant sold the property to a third person. On January 2, 1976, plaintiffs received from the defendant a notice to vacate, stating that their month-to-month tenancy was to terminate February 14, 1976. The plaintiffs then retained an attorney and ultimately brought this action for damages and specific performance of an oral contract to purchase the property.

The plaintiffs first contend that the trial court erred in denying their motion for continuance after they discharged their attorney 9 days before trial.

The history of this case subsequent to Glasgows receiving a notice to vacate is relevant:

1. Notice to vacate by February 14, 1976, received January 2, 1976.

2. At the Glasgows' request, Bartleson extended the time to vacate until March 1, 1976.

3. March 1, 1976, the Glasgows filed the summons and complaint seeking specific performance of the oral contract and continued to occupy the premises.

4. March 4, 1976, Bartleson's answer to the Glasgows' complaint was filed and served.

5. Bartleson's motion for writ of restitution heard

March 24, 1976, and denied April 9, 1976. Trial set for April 12, 1976.

6. April 12, 1976, in lieu of proceeding with trial, the Glasgows agreed to vacate by April 30 or, in the alternative, permit an immediate writ of restitution to issue as of the latter date.

7. May 5, 1976, when the Glasgows failed to vacate the premises by April 30, Bartleson returned to court seeking a writ of restitution. Writ denied after Glasgows' attorney successfully argued for a stay if the rent, more than two years in arrears, would be paid into the registry of the court or to Bartleson's counsel. Trial reset for May 18.[3]

8. May 14, 1976, Mr. Glasgow's deposition was taken by Bartleson's counsel.

9. May 17, 1976, the Glasgows discharged their counsel.

10. May 18, 1986, due to unavailability of courtroom trial was continued until May 26.

11. May 20, 1976, the Glasgows hired new lawyer after at least one prior attempt to hire different counsel.

12. May 21, 1976, the Glasgows' new counsel moved for continuance; continuance was denied May 24.

13. During 1976 plaintiffs paid arrearages bringing the payments current.[4]

14. May 26, 1976, trial commenced before visiting judge.

Plaintiffs contend they were justified in discharging their first attorney and their second attorney was not given adequate time to prepare for trial. Whether to deny or grant a motion for continuance is a matter of discretion with the trial court. This court will set aside that decision only if there has been abuse of discretion. *Balandzich v. Demeroto,* 10 Wn. App. 718, 519 P.2d 994 (1974);

[3]Some of these facts are taken from the respondent's (Defendant) brief and went unchallenged by the appellants (plaintiffs).

[4]It appears that sometime between February 1976 and trial plaintiffs deposited with Bartleson's attorney an amount between $3,450 and $3,850 as full payment of the past-due account.

Jankelson v. Cisel, 3 Wn. App. 139 473 P.2d 202 (1970). The court in *Balandzich v. Demeroto, supra,* set out the following factors to be considered by the court in determining whether to grant a continuance:

> [T]he necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Balandzich v. Demeroto, supra at 720. The fact that the plaintiffs discharged their first attorney does not automatically entitle them to the granting of their motion for continuance. *Peterson v. Crockett,* 158 Wash. 631, 291 P. 721 (1930); *Jankelson v. Cisel,* supra; Annot. 48 A.L.R.2d 1155 (1956); *Cf. Peterson v. David,* 69 Wn.2d 566, 419 P.2d 138 (1966).

A prompt disposition of this litigation was important not only because it involved the present parties' interests in the property, but also because the defendant had sold the property to a third person approximately six months before plaintiffs requested the continuance on May 21.

Although a continuance would have granted plaintiffs' attorney more time to prepare for trial, additional time does not appear to be necessary for reasons noted below. This case does not involve a complicated fact pattern, numerous parties, legal theories, or witnesses that other cases may involve. It essentially involved a factual question of whether there was an oral contract to sell real property and, if so, whether there was part performance of that oral contract. All evidence on this issue came solely from the plaintiff, Dr. Glasgow, and the defendant, Mr. Bartleson.

Plaintiffs' second attorney received the case on May 20 and trial was set for May 26. This would appear to be sufficient time to prepare for this particular case; the attorney was not justified in delaying his preparation until he received the court's decision on the motion for continuance. Plaintiffs' third attorney, counsel on appeal, was unable to offer any suggestions of additional evidence which might have been discernable had the court granted the continuance. Thus, plaintiffs have not shown that their needs were such that the continuance was imperative to their case.

On the other hand, each trial delay was prejudicial not only to the defendant, but also to the third person who had bought the property six months earlier. Even though plaintiffs had received a notice to vacate the property by Februrary 14, they still remained in possession of the property at the time of trial; the numerous attempts to force plaintiffs to vacate the property had proved unsuccessful.

Furthermore, the plaintiffs had twice agreed to vacate the premises voluntarily, if they were given more time, once until March 1, 1976, and again until April 30, 1976. Neither agreement was honored. It is likely that if the trial had been continued, plaintiffs would have attempted to further continue their possession of the property,[5] thus delaying either defendant or his buyer possession of the property. Therefore, a speedy disposition of the case was essential to determine the rightful owner of the property and to allow that owner possession of the property. Finding no manifest abuse of discretion, we affirm the denial of the continuance.

[5]On oral argument before this court, counsel admitted that the Glasgows were still in possession of the property and that neither what they considered contract payments, nor what Bartleson contends is rent had been paid since the trial of this matter, in excess of 17 months. Notwithstanding these remarks, in addition to a supersedeas bond of $3,000 originally posted with the trial court, plaintiffs have paid slightly over $2,800 into this court, pursuant to commissioner's rulings July 23, 1976, and August 16, 1976, to be applied to any rent obligation possibly incurred by plaintiffs pending this appeal.

Plaintiffs next assign error to the trial court's findings of fact and conclusions of law to the effect that there was no oral contract for the lease or sale of the property, that the plaintiffs in actuality had a month-to-month tenancy in the property, and the defendant was entitled to possession as against the plaintiffs. We disagree.

Plaintiffs failed to prove the existence of an oral contract by clearly and unequivocally proving its terms, character and existence.[6] *Miller v. McCamish,* 78 Wn.2d 821, 479 P.2d 919 (1971), *Granquist v. McKean,* 29 Wn.2d 440, 187 P.2d 623, (1947); *Clarke v. Alstores Realty Corp.,* 11 Wn. App. 942, 527 P.2d 698 (1974); *Louron Industries, Inc. v. Holman, 7 Wn. App. 834, 502 P.2d 1216 (1972).*[7]

Although Dr. Glasgow testified that he thought he was buying the property, he also made several statements which refute the existence of an oral contract. On cross-examination Dr. Glasgow testified as follows:

> [By Mr. Roberts] Q. If you had to write out a contract today, would you know what to write out? A. It would have to be negotiated between the two parties. Q. So, we don't know the length of time it would take you to pay it off, is that correct? A. That's right. Q. We don't know what the

[6] In the absence of a written, signed and properly acknowledged deed as required by RCW 64.04.010 and .020, plaintiffs were required to prove part performance of an oral contract. ***Miller v. McCamish, supra.***

[7] Plaintiffs' evidence did conform to three indicators of part performance of an oral contract, i.e.: (1) actual and exclusive possession of the property; (2) tender or payment of consideration; (3) permanent, substantial, and valuable improvements. *Richardson v. Taylor Land & Livestock Co.,* 25 Wn.2d 518, 171 P.2d 703 (1946); *(Louron Industries, Inc. v. Holman, supra.* But, plaintiffs' proof must point solely to the existence of the oral contract. Evidence which suggests another possible relationship, i.e., landlord-tenant, is insufficient. *Miller v. McCamish, supra; Granquist v. McKean, supra; Clarke v. Alstores Realty, supra.*

> total purchase price would be. A. Not precisely. Q. And we don't know what the interest rate would have been. And do I understand you that these things change from time to time? A. Yes. Q. So that there was no definite contract at any time? A. With what you say strictly, no. Q. But it was different than what you're claiming in the lease agreement of 19—proposed lease agreement of 1963? A. We had mutually agreed that it would be higher fees and I agreed to that. . . .

Later, when questioned on redirect examination, Dr. Glasgow testified as follows:

> [By Mr. Dawson] Q. As I understand it, there was discussion about changing the terms ofthe purchase price, is that correct? A. Yes, it is. Q. Was there ever any agreement as to changing the purchase price? A. It would be approximately $3,000 more, but there was room for latitude on that. Q. In other words, you discussed changing the terms. I'm asking you did you ever in fact change the purchase price from $30,000 to any other figure? A. No. When I pressed for that, he said it would be about $33,000. Q. No. Did you ever agree, you and John. I understand you discussed it, but was there any . . . A. There wasn't any exact agreement, no.

Thus, through his own testimony, Dr. Glasgow fails to establish clearly and unequivocally the terms, character or existence of an oral contract for purchase of the property.

Furthermore, in considering the above indicators of part performance of an oral contract, the evidence presented not only points to the possibility of a landlord-tenant relationship, but also seems to support that

relationship more than a seller-purchaser relationship. (1) Although the plaintiffs had acutal and exclusive possession of the property, they obtained such possession initially by entering into a 3-year lease and merely continued in possession of theproperty after the term of the lease had expired. (2) During the initial 3-year lease term, the plaintiffs paid consideration in the form of rent. After that lease term, the plaintiffs attempted (however unsuccessfully) to pay the rent as specified in the unsigned 1963 lease agreement. The fact that the plaintiffs made a payment of consideration here does not necessarily point to a seller-purchaser relationship; the plaintiffs had possession of the property and would therefore be expected to pay rent. (3) Dr. Glasgow testified he made approximately $18,000 of improvements to the property. He further testified the defendant had not wanted to make any improvements and that the plaintiffs made lower rent payments on the condition that they would make their own improvements to the property. Thus, the evidence fails to support a seller-purchaser relationship, exclusively, and appears to make a stronger case for a landlord-tenant relationship. Therefore, the trial court's determination that there was no part performance of an alleged oral contract and that the plaintiffs were merely in a month-to-month tenancy was proper.

Plaintiffs additionally challenge the trial court's determination that Bartleson was entitled to possession of the property because plaintiffs were merely in a month-to-month tenancy which was properly terminated. After the expiration of the earnest money agreement in 1963, the plaintiffs' continued possession and payment of rent merely indicated that they were in a month-to-month tenancy. *Lowman v. Russell, 133 Wash. 10, 233 P. 9* (1925); RCW 59.04.010 .030. With the written notice to vacate received by plaintiffs January 2, 1976, Bartleson gave more than adequate notice that the tenancy was terminated (RCW 59.04.020). The plaintiffs were and are no longer entitled to possession of the property.

Judgment affirmed.

Pursuant to RCW 2.06.040, this opinion will not be published.

/s/ C. J. Munson

WE CONCUR:
/s/ J. Green
/s/ J. McInturff

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAX L. GLASGOW, JR., and STEPHANIE J. GLASGOW, a marital community,

Appellant,

v.

CHARLES J. BARTLESON, dealing in his separate property,

Respondent,

and

JAMES HORD, d/b/a SKYLINE REALTY

Defendant.

SUPPLEMENTAL

MANDATE

No. 2007-III

Spokane County No. 229986

Notation order by Supreme Court denying Petition for Review, dated June 1, 1978.

The State of Washington to: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on December 21, 1977, became the decision terminating review of this court in the above entitled case on June 5, 1978. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Costs on appeal in the amount of sixty-seven and no/100 ($67.00) in favor of respondent and against appellant.

cc: Richard J. Schroeder
William D. Roberts
Hon. John J. Champagne
Reporter of Decisions

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Spokane, this 5th day of June, 1978.

/s/ Leonard J. Nelson, III
Clerk of the Court of Appeals,
State of Washington,
Division III